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Privatizing Reparations

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PRIVATIZING REPARATIONS

SAUL LEVMORE*

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INTRODUCTION

The literature on reparations as a remedy for past discrimination, slavery, unjust enrichment, and endowment inequality makes it easy to understand why citizens and politicians will hold disparate views regarding the morality and wisdom of reparations. Large-scale reparations, such as those proposed for African Americans who were wronged by slavery and a long history of discrimination, appear to have little chance of political or judicial implementation. This article sets out to design a reparations scheme that could attract sufficient political support, despite the fact that a significant majority of surveyed citizens presently oppose reparations. The centerpiece of the design strategy is the unconventional idea of elective, or privatized, reparations, in which the government, through tax rules and a willingness to enforce various contingent promises, serves something of an enabling function. Individuals and businesses are then encouraged to opt-in by pledging multi-year payments or surtaxes. These reparative payments might be contingent on other citizens making similar and coordinated pledges. The government might also promise to give credit for private payments in the event that payments are coerced in the future. Privatized reparations bear some resemblance to charitable giving and some likeness to political campaign contributions, but reparations present distinct collective action, personal morality, and institutional design issues. I go on to consider some of these public choice issues, as it explores the thin line between charitable endeavors and direct government programs and then also between voluntary, private investments and successor public interventions.

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I. THE RE-EMERGENCE OF REPARATIONS CLAIMS

African American reparations, associated with slavery and a long history of discrimination, appears to be an impossibly academic topic. But, legislation proposed some sixteen years ago for Japanese Americans interned during World War II and the re-opening of the question of German reparations to Holocaust survivors have generated a resurgence of interest in the subject.¹ Even so, it is much easier and safer to explain why African American reparations are different and presently absent than it is to argue for a particular plan of reparations.² In previous work, I have joined others on the easier path and emphasized the relatively large number of African American slave descendants, the long passage of time since slavery, the dispersed character of slave descendants or victims of racial discrimination in the last century, and the existence of affirmative action and other programs which might be seen by some voters and scholars as substitutes for reparations.³ As a purely positive matter, African American reparations are unlikely to materialize, and are perhaps as unlikely as a renegotiation with current American Indians regarding the purchase of Manhattan Island long ago or as a recovery from present Southerners for the firing on Fort Sumter.⁴ I will not back away from those positivist arguments here. Instead, I take this assessment as an opportunity to ask what sort of reparations plan might have some chance of political success. I admit to mixed motives. My aim is to show that voluntary participation may be the stuff of political compromise, and then to see what public choice lessons may be learned from such compromise.

Reparations is a public choice topic precisely because it is an idea, or aspiration, that remains on some political agendas and *does* emerge in legislation from time to time,⁵ and that is normally – and perhaps inevitably –

¹ See Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 696-97 (2003).

² See *id.* at 746-47 (explaining the relative ease of identifying and discussing problems, both moral and practical, with reparations plans as compared to the significant difficulties in establishing a concrete proposal).

³ See Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657, 1688-90 (1999) [hereinafter Levmore, *Changes*] (acknowledging the arguments weighing against reparations for victims of slavery or historical discrimination).

⁴ See *id.* (noting the lack of majority support for African American reparations).

⁵ See Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 286-90 (2003) (describing the different waves of African American reparations activism since the end of the civil war); Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining The Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 686-87 (1999) (reporting that “[i]n 1989 and in every session of Congress since 1993, the African American Reparations Commissions Act . . . has been introduced, calling for the establishment of a Commission to Study Reparations Proposals for African Americans” and that “[t]o date, the bill has not gone past the Committee on the Judiciary”).

avored by a minority of voters in intense fashion.⁶ Generally speaking, this sort of intense, minority preference is satisfied through bargains with other minorities, or interest groups, through explicit market transactions, or simply because a well-organized group can enjoy considerable power in the political process.⁷ If, for instance, a minority favors foreign aid to Greece or Israel, it may come into being as part of a package in which the “winners” are likely to give up something with respect to other programs or taxes.⁸ Similarly, if a minority favors a given airport expansion, it might get its way as part of a portfolio of transportation projects, it might simply be able to “buy” the airport expansion on its own and pay for it through local taxes or user fees, or it might be able to give or promise support to politicians while the costs of the plan are imposed on dispersed interests.

Where race is concerned, a strong tradition in constitutional law suggests that some groups may be repeatedly unsuccessful in gaining their share of political bargains.⁹ In the case of African American reparations, it is striking both that such reparations are strongly favored only by a substantial majority of African Americans¹⁰ and that while affirmative action (which might be seen

⁶ See Ogletree, *supra* note 5, at 286-90 (discussing the intense minorities that have actively favored African American reparations in the past); see also *infra* note 10 (reporting survey data indicating that African American reparations are currently favored by a minority of, mostly African American, voters).

⁷ The matter is likely to stay in focus because of the well-known advantages that intense and well organized minorities can wield in the political process. See Levmore, *Changes*, *supra* note 3, at 1688 (noting that “public choice theory suggests that a small organized minority will often fare better than a dispersed one of equal size – or even of much greater size”) (citing MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971)). If tobacco farmers and other groups can obtain billions of dollars in benefits because they have qualities that permit political overachievement, then we might expect some reparations plans to succeed in similar fashion. Cf. *id.* at 1688 (noting that Japanese American reparations may reflect the power of small organized minorities to achieve their goals).

⁸ See *id.* at 1665-66 (positing one view of political compromise that states that where minorities, or losers, “have sufficient power to delay or block desirable change, winners . . . find it worthwhile to compensate losers in order to go forward . . .”).

⁹ See RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 237-39 (bemoaning the belief that, regardless of African American votes, “those who exercise control over our national public policy see no reason why they should care very much about taking steps to fix what America has done to blacks”).

¹⁰ One survey suggests that 32% of White Americans think they should make up for past and present discrimination, 38% think the federal government should apologize for slavery, and 19% think the federal government should make payments to those whose ancestors were slaves, though only 11% gave an affirmative response when this was put in terms of reparations to descendants of slaves. The rate of affirmative responses from Blacks was significantly higher with, for example, 64% agreeing that White Americans have benefited from past and present discrimination against African Americans, and should be willing to make up for these past wrongs. Karlyn Bowman, *Reparations? White and Black Attitudes towards Reparations for Slavery*, AMERICAN ENTERPRISE, July 2001, available at

as something of a substitute for reparations,¹¹ though it will be useful to side-step that question here) has become part of many political bargains,¹² it often burdens disparate, unidentifiable, and politically weak persons – at least as compared to any imaginable reparations plan.¹³

It is with all this in mind that this article begins with the question of what sort of reparations plan would have the best chance of success. This question is peppered with ambiguity. The term “best” means better or as good as any other, and not more-likely-than-not. I have already suggested that no reparations plan is likely.¹⁴ “Reparations” itself is an ill-defined term, and, indeed, much of what I sketch in this article could be criticized as insufficiently reparative because it is forward rather than backward looking.¹⁵ This criticism, it should be noted, implies that affirmative action is not reparative, and many observers will not want to subscribe entirely to that view.¹⁶ Finally, “success” is also an elusive concept, and much too easily asserted. I will take it to mean not only the passage of some sort of legislation, but also the participation of enough people, both as beneficiaries and as bearers

http://www.findarticles.com/p/articles/mi_m2185/is_5_12/ai_76488234. In another survey, 30% of Whites favored an apology and only 4% favored monetary reparations, while 79% of Blacks favored a formal apology and 67% were for monetary reparations. The same respondents were asked about reparations for Japanese American internees, though at the time such reparations had already been legislated and publicized; 43% of the Whites favored an apology, with 26% in favor of payments. Black respondents were much more positive; 75% for apology and 59% for payments. Harbour Fraser Hodder, *Riven by Reparations: The Price of Slavery*, HARV. MAG. May-June 2003 (reporting on work by Michael Dawson and Rovana Popoff), available at <http://www.harvardmagazine.com/on-line/050319.html>. Finally, another survey that looked for a racial comparison found that the breakdown for money reparations was 6% (White respondents) to 55% (Black respondents). *Reparations in Black and White*, DALLAS MORNING NEWS, Aug. 18, 2002, at J6 (reporting on a CNN-USA Today Gallup poll).

¹¹ See Levmore, *Changes*, *supra* note 3, at 1688-89 (noting the possibility that many people do not support reparations because “[a]ffirmative action or other programs might be understood as substitutes for monetary reparations”); Posner & Vermeule, *supra* note 1, at 727-29 (discussing the possible role for affirmative action in future reparations schemes).

¹² Chisolm, *supra* note 5, at 683-84 (stating that in recent years support for reparations has been fueled by efforts to dismantle affirmative action).

¹³ See Posner & Vermeule, *supra* note 1, at 729 (“[T]he costs of affirmative action fall upon a largely national group - marginal nonpreferred candidates, who may often not know whether the preference was dispositive in denying them relevant goods or opportunities, and who are unlikely to be able to organize for effective political action. Under a cash reparations scheme, by contrast, the recipients of the benefit are easy to identify . . .”).

¹⁴ See *supra* notes 3-4 and accompanying text (mentioning the difficulties, both practical and political, involved in shaping an effective African American reparations plan).

¹⁵ See Posner & Vermeule, *supra* note 1, at 690 (defining “reparations” as backward looking).

¹⁶ See *id.* at 727 (asserting that “[t]he leading mode of in-kind reparative payment, at least in the United States, is remedial affirmative action”).

of the burdens, that a significant portion of the population is satisfied (at the very least) that a sincere apology has been given.¹⁷ Success might also be measured by closure.¹⁸ If after the enactment of plan X, no serious reparations claim arises for a generation or more, we might conclude that X was successful.

Following the introduction of a plausible reparations plan, I will turn to the more academic question of what we learn from the exercise. One lesson is that the line between government spending and philanthropic endeavors is a thin one. Another is that collective action problems permeate not only democratic decisions, but also commitments to charities, apologies, and virtually everything associated with past and imagined reparations. This article takes the first step in a larger project which aims to understand how private preferences, embedded in the stuff of free enterprise and individual liberty, easily evolve into government programs and mandates.

The academic literature on reparations for African Americans is wide-ranging, but largely as skeptical as I have been thus far.¹⁹ It thus reflects popular sentiment and media coverage, which focus on the seemingly insurmountable questions of who would pay and who would receive reparative payments, and of what magnitude.²⁰ Despite the skepticism and difficulties, there has been excellent work on the potential for reparations as a remedy for past discrimination, slavery, and unjust enrichment.²¹ The richness of this work makes it easy to understand why citizens and politicians hold disparate

¹⁷ See Ogletree, *supra* note 5, at 306 (asserting that “prospective injunctive relief such as a government apology and acknowledgment of its racist practices . . . may be more important than monetary relief in promoting the . . . goal of racial reconciliation”).

¹⁸ See Levmore, *Changes*, *supra* note 3, at 1693 (arguing the possibility that “the majority declines to make [reparations] payments early because there is no guarantee that the victims will treat the payments as final”); Posner & Vermeule, *supra* note 1, at 744-46 (highlighting the importance of finality in developing and analyzing reparations proposals).

¹⁹ See, e.g., Posner & Vermeule, *supra* note 1 (analyzing the difficulties and skepticism associated with the debate for African American reparations); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 502-23 (1998) (supporting African American claims to reparations, but expressing doubts as to the ultimate success of any judicial or legislative schemes).

²⁰ See, e.g., David L. Chappell, *If Affirmative Action Fails . . . What Then?*, N.Y. TIMES, May 8, 2004, at B7 (asserting that “politically, reparations are a pipedream”); Kurt Schmoke, Editorial, *The Problem with Payback*, WASH. POST, August 28, 2001, at A15 (acknowledging the disparate conceptions of reparations).

²¹ See generally Ogletree, *supra* note 5 (defending the reparations cause); Posner & Vermeule, *supra* note 1 (providing an overview of the legal, moral, and conceptual issues surrounding reparations and introducing analytical tools for further reparations debate); see also ROBINSON, *supra* note 9, at 201-34 (discussing the need for restitution for African Americans harmed by slavery and the long history of discrimination in the United States); RUTI G. TEITEL, TRANSITIONAL JUSTICE 119-47 (2000) (discussing reparations programs and the various viewpoints both in favor of and against implementing such programs).

views regarding the morality and wisdom of reparations.²² I will assume some familiarity with this literature, as well as an appreciation of the issues raised by the prospect of African American reparations, as I endeavor to design what I will call “privatized reparations” for African Americans. Much of the discussion bears on other applications, but the following exercise is most relevant to large-scale settings where millions of voters or members of a class might be asked to finance reparative payments to thousands or even millions of victims or putative beneficiaries²³ – and where, once again, a straightforward proposal for reparations to be paid by a government largely responsible for past wrongs is politically doomed.²⁴

II. BACKWARD AND FORWARD-LOOKING, ELECTIVE REPARATIONS

It is easy, and perhaps too easy, to dismiss the prospect of large-scale African American reparations as absurd or as simply so unlikely as not to be worth exploring. But imagine a proposal for relatively modest reparations to be accompanied by a public apology and to be paid *by* volunteers *to* two distinct groups. The first part of the plan is to pay \$20,000 to each living African American veteran who served in the Armed Services of the United States between 1939 and 1945.²⁵ Second, the plan will pay the same amount to a very different group; African American high school graduates in the year the plan is first enacted and sufficiently funded, and then to a new class of graduates each year thereafter until a set of trustees decides that there are insufficient funds or reasons to continue.²⁶ These payments will come from a

²² See, e.g., Schmoke, *supra* note 20 (asserting that “the term ‘reparations’ means many things to many people”).

²³ See Posner & Vermeule, *supra* note 1, at 696-97 (listing previously implemented large-scale reparations programs).

²⁴ See, e.g., Levmore, *Changes*, *supra* note 3, at 1688-90 (assessing publicly funded reparations to be politically impossible); Chappell, *supra* note 20 (asserting the political and practical impossibility of African American reparations).

²⁵ The \$20,000 figure matches that offered in the Japanese American reparations program of 1988. See Posner & Vermeule, *supra* note 1, at 696. It is also a convenient amount for the second prong of the plan sketched here. See *infra* note 26.

²⁶ The \$20,000 amount is sufficient to pay an average college tuition. The average published tuition at public universities exceeds \$4,000 per year, though the average tuition *paid* (taking grants, tax breaks, scholarships, and the like into account) was less than \$3,000. The average tuition paid at private universities was about \$10,000, with about one-quarter of enrolled students attending private rather than public colleges. NATIONAL CENTER FOR EDUCATION STATISTICS, SPECIAL ANALYSIS 2004 – PAYING FOR COLLEGE: CHANGES BETWEEN 1990 AND 2000 FOR FULL TIME, DEPENDANT UNDERGRADUATES, at http://nces.ed.gov/programs/coe/2004/analysis/sa_table.asp?tableID=7 (last accessed Oct. 1, 2004). This cost may be covered by a doubling of the reparations amount used in the text, though, of course, room and board for those who attend college away from home adds considerably (and more, proportionally, than it did a generation ago) to these costs. Even the \$20,000 payment would surely make college affordable for the great majority of African

Reparations Fund that will, through its well-chosen trustees, seek support from contributors.²⁷ Many citizens will be much more likely to make a contribution if millions of other citizens do so, and the plan is far more likely to promote improved race relations if participation is broad and deep. The Fund will thus do well to provide information about participation and to take steps to encourage a large group of volunteers. An apology, whether moved in Congress or developed by another group, is an important part of the plan, though it must be accompanied by significant payments to individuals or organizations, or it will suffer from the perception that talk is all too cheap.²⁸

The first beneficiary group draws its strength from the success and example of reparations to Japanese American internees. This reparative program, and recent precedent, puts opponents of African American reparations on the defensive.²⁹ The African American slavery experience long predates Japanese American internment camps, but, of all the discrimination suffered by African Americans, it may be symbolically and functionally useful to single out the startling discrimination suffered by African Americans who volunteered for (or were later inducted into) the Armed Services between 1939 and 1945.³⁰ Although opportunities for service and advancement in the military improved as the war waged on,³¹ well-documented and serious discrimination existed during most of the war.³² In fact, the policy of racial segregation in the

Americans.

²⁷ The Reparations Fund trustees might make suggestions in the form of flat amounts or surtaxes, but the precise amount of these pledges may be less important for the overall emotional and political impact of the plan than the rate of participation or the fact that the plan takes effect at all.

²⁸ See Posner & Vermeule, *supra* note 1, at 731 (“[A]n apology without transfer may be criticized as ‘cheap talk’ for which the government will gain no moral or legal credit.”); Yamamoto, *supra* note 19, at 517-18 (expressing the feelings of many Japanese Americans that “although monetary payments ‘could not begin to compensate . . . for [their] . . . lost freedom, property, livelihood, or the stigma of disloyalty,’ the reparations demonstrated the sincerity of the government’s apology”) (quoting NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 107 (1991)).

²⁹ See Chisolm, *supra* note 5, at 716 (asserting that the Civil Liberties Act granting Japanese Americans reparations “established a precedent for legislative compensation to a particular racial group that suffered unique injuries due to racially motivated law enforcement” and that “based on a comparison of the ‘victims’ experiences, it is difficult to fathom a reasonable justification for *not* enacting the African American Reparations Bill”).

³⁰ See F. Michael Higginbotham, *Soldiers for Justice: The Role of the Tuskegee Airmen in the Desegregation of the American Armed Forces*, 8 WM. & MARY BILL RTS. J. 273, 279-90 (2000) (discussing the discrimination and segregation that faced African Americans in the armed forces during World War II).

³¹ See *id.* at 283 (acknowledging that by 1944 the opportunities for African Americans to serve in combat increased somewhat from the extremely limited opportunities presented African Americans before the war).

³² See *id.* at 279-90 (commenting that the military deliberately assigned the majority of black soldiers to “road building, stevedoring, laundering, and fumigating”).

military was not officially brought to an end until 1948.³³ War experience played a role in determining post-war employment opportunities (and social status) for many Americans, but African Americans were largely denied the ability to develop distinguished service records. There are, of course, many African Americans who worked in factories during the war, and who contributed enormously to the war effort in the face of discrimination. These persons will not collect from the Fund. On the over-inclusive side, there will be African Americans in the veterans' beneficiary group who did advance in the military and whose overall experience was more like their white counterparts. On the other hand, there is something fitting about reaching back in time, in part because Japanese Americans who were interned during that same period have now received some reparations and an apology.³⁴ Both groups are aged and shrinking rapidly and, as we will see, reparations are often most fitting and most acceptable when time is of the essence and when, more cynically and practically, the beneficiary group will be unlikely to return some years later and ask for greater payments. The number of persons in this group is presently about 200,000, but it is, again, a quickly declining population.³⁵ The goal of the present proposal is to give each member of this group \$20,000, not because the wrongs they suffered are assessed at this particular amount or are considered equal to those suffered by Japanese American internees, but

³³ President Truman officially desegregated the armed forces on July 26, 1948. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948); *see also* Higginbotham, *supra* note 30, at 316.

³⁴ The simple language of the statute authorizing reparations to Japanese Americans is instructive.

The purposes of this Act are to –

- (1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II;
- (2) apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens;
- (3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the recurrence of any similar event;
- (4) make restitution to those individuals of Japanese ancestry who were interned;
- (5) *[deals with payments to Aleuts and is not reproduced here]*;
- (6) discourage the occurrence of similar injustices and violations of civil liberties in the future; and
- (7) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations.

50 U.S.C. § 1989 (2000).

³⁵ African Americans are estimated to constitute approximately 5% of the living veteran population. *See* Department of Veterans Affairs, VA Fact Sheet: World War II Veterans by the Numbers (2004), at <http://www1.va.gov/pspao/docs/WWIIvetsfactsheet.doc>. The death rate of World War II veterans is estimated to be 50 per day (the median age of all veterans of that war was 80.1 in 2003). *See id.*

rather because, given the impossibility of setting a price on these wrongs, the amount given once to a different set of survivors now seems symbolically valuable.

Standing on its own as the object of a reparations proposal, this first group affects too few African Americans and refers to too short a period in a long history of slavery and discrimination to offer finality and, therefore, any chance of political acceptance and success. This group also raises the obvious question of why one set of wrongs should be addressed, while others are not. An honest response to both these objections is that no plan that tries to make payments to all who suffered will succeed, for the discrimination was horribly and widely injurious for so long a period.³⁶ Another reaction is that, of all the easily identifiable beneficiary groups, this veterans' group offers the advantage of most closely matching Japanese American internees in terms of finality and size. But these answers are a bit thin without the inclusion of a second, forward-looking group of beneficiaries. This second group may not be unique in its connection to slavery or past discrimination, but it is a useful component to a plan that aims to heal old wounds and possibly even bring an end to other race-based programs.

The second beneficiary group is of uncertain size because the duration of the plan depends on its funding level, which, in turn, depends on contributors. While the trustees may specify a date of dissolution and designate organizations that stand ready to receive contributions after that date, it is the donors who will effectively decide when the plan has run its course.³⁷ This is one important sense in which these reparations are privatized.

Dissolution may also come about because of developments in affirmative

³⁶ See *id.* at 740 (admitting the difficulty in identifying would be beneficiaries of slave and historical discrimination reparations payments); Yamamoto, *supra* note 19, at 491 (describing the difficulty in identifying victims of slavery and past discrimination as a major obstacle to the success of African American reparations lawsuits). The problem is thus one of cost as well as identification. Payments based on evidence of the denial of employment or college admission because of race, for example, is very difficult because so many African Americans did not apply to schools or for jobs, given the knowledge that they would be denied because of their race.

³⁷ Indeed, borrowing from the "stakeholder" idea fashioned by Bruce Ackerman and Ann Alstott, legislation could provide that anyone who receives a reparations payment of this kind owes it back to the Fund – or to the designated organizations – at his or her death, as a first claim on the beneficiary's estate. BRUCE ACKERMAN & ANN ALSTOTT, *THE STAKEHOLDER SOCIETY* 82-83 (1999) (suggesting a substantial payment, or stake, to every one who comes of age and advancing the scheme with the idea that the estate of a stakeholder would, if funds were available, be required to repay the amount once received, plus interest, to a stakeholder fund). This idea is rather unimportant if the Fund lasts but ten or twenty years, because few beneficiaries will die before that time. It is, however, a reasonable way of encouraging beneficiaries, as well as other citizens, to make voluntary provisions in their wills, see *id.* at 82-84, but it is distracting in that it makes the reparations into more of a loan.

action or other law. Reparations might be seen in some quarters as a substitute for affirmative action, or, in others, as an important accompaniment to that practice, sufficiently powerful that the two working together will allow both programs to reach a successful conclusion after one or two decades.³⁸ It is possible that more certainty would generate more support. Genuine enthusiasm might accompany a reparations plan that promised an end to affirmative action on a given date, though it is hard to see exactly how such a promise about private programs could be made. But one group's enthusiasm would be another's criticism, as a promise about ending affirmative action would diminish the quality of an apology. Many beneficiaries and some contributors should be expected to object if a reparations plan were instituted as an explicit substitute for affirmative action. The idea advanced here recognizes that either substitution or complementarity is possible, but that this is largely in the hands of future donors.

It is easier to criticize this plan than to extol its virtues, but I will begin by describing some of its features and then expand on my claim that this proposal is the sort of reparations plan that could succeed. The amount of money at stake is modest, by the standards of reparations,³⁹ or large-scale welfare programs. The veterans' group might contain 150,000 (or more) people at the start of a reparations program,⁴⁰ and it therefore requires \$3 billion of the Fund in order to finance a \$20,000 benefit. If some years pass before a reparations plan is underway, the number will be much lower.⁴¹ The second group consists of some 333,000 African American high school graduates in a given year, of which about 194,000 will go to a two-year or four-year college.⁴² College attendance is, of course, not a requirement of beneficiaries; many graduates will enter the civilian workforce or the armed services, and some will engage in family matters or be unemployed. One could modify the plan to make it a college scholarship plan, but this might cause more resentment than

³⁸ See ROBINSON, *supra* note 9, at 8 (arguing that although affirmative action should continue, alone it does "little for the millions of African Americans bottom-mired in urban hells by the savage time-release social debilitations of American slavery" or "for those Americans, disproportionately black, who inherit grinding poverty, poor nutrition, bad schools, unsafe neighborhoods, low expectation, and overburdened mothers"); Posner & Vermeule, *supra* note 1, at 745 (acknowledging the possibility of a reparations plan in conjunction with a redesigned form of affirmative action).

³⁹ See Posner & Vermeule, *supra* note 1, at 696-97 (detailing other national and international large-scale reparations payments).

⁴⁰ See *supra* note 35 and accompanying text (discussing the size of the relevant veterans' group).

⁴¹ See *id.* (projecting the death rate of the members of the veterans' group).

⁴² U.S. BUREAU OF LABOR STATISTICS: TABLE 1. LABOR FORCE STATUS OF 2003 HIGH SCHOOL GRADUATES AND 2002-2003 HIGH SCHOOL DROPOUTS 16-24 YEARS OLD BY SCHOOL ENROLLMENT, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY 1 (October 2003), <http://www.bls.gov/news.release/hssect01.htm>. These numbers will likely not differ dramatically over a several-year period.

success. In fact, it might be seen as intending to favor colleges rather than persons related to, and affected by the experiences of, those seen as most deserving of reparations but now unavailable or unidentifiable.

In passing, note that about 88,000 African American high-school students drop out of school every year.⁴³ These people will not receive the benefit described here. This group may shrink in favor of increased high school completion, as potential beneficiaries hope to claim the promised share of reparations. Indeed, there is the modest danger of collusion between students, teachers, and schools, because graduation will take on greater value with the reparations plan in place. There is, however, no incentive for high school students to delay their graduation in order to receive payments and the hazards generated by the offer of payment are surely small compared to the potential benefit from encouraging young people to continue with their education, at least through high school.

To be sure, colleges may benefit from the Fund, because they may choose to reduce financial aid awards to admitted students who are known to arrive with reparations. On the other hand, colleges will continue to compete for applicants, and for minority applicants at that, and there may be upward pressure on these awards (much as upper middle class minority applicants to colleges now enjoy relatively generous financial aid awards, at least compared to their predecessors). It may also be possible that colleges will be able to give larger financial aid awards to non-African American students. Finally, governments may choose to give more or less support to college students or to institutions of higher education if this plan takes effect. These are but some of the unintended, or uncertain, consequences of the plan. None of them, however, does damage to the idea of privatized reparations.

At a benefit level of \$20,000, the second group requires something on the order of \$6.7 billion each year, which is much less than the annual federal expenditure on Pell grants.⁴⁴ After ten or twenty years, the total expenditure of the plan might be \$50 to \$135 billion, or possibly even more if the trustees raise the benefit. By way of comparison, the federal government spent about \$57 billion in 2003 alone on education and about the same on veterans' assistance.⁴⁵ Another way to think about the relative scale of the plan is that

⁴³ *Id.* The dropout figure may be an underestimate because data are developed on the basis of individual reporting and household members may be confused about high school diplomas and Graduate Equivalency Diplomas, for example. See JAY P. GREEN, HIGH SCHOOL GRADUATION RATES IN THE UNITED STATES (Nov. 2001, rev. Apr. 2002), at http://www.manhattan-institute.org/cr_baeo.pdf (discussing the collection of dropout information in census forms).

⁴⁴ JACQUELINE E. KING, 2003 STATUS REPORT ON THE PELL GRANT PROGRAM 27-28 (2003) (reporting the details of a program providing need-based grant assistance, and serving one in four undergraduates with 2002 expenditures of \$11.3 billion, a maximum grant of \$4,000, and an average grant of \$2,415), at http://www.acenet.edu/bookstore/pdf/2003_pell_grant.pdf.

⁴⁵ See OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES 2005:

the federal government annually spends about \$20,000 per household.⁴⁶ Under the plan set forth here, more than 400,000 households would receive \$20,000 in the first year of the plan, and somewhat fewer than 400,000 a year thereafter – in addition to whatever these households receive under other programs. Over a ten or twenty year period, including the one-time payment to veterans, more than half of all African American households will likely receive some reparative payment. This fraction depends on how long the plan stays in force, which is mostly in the hands of volunteer donors, with some help from the trustees and Congress. Finally, the annual payments required at the outset, including the money for the veterans' benefit, amount to something less than 5% of current charitable giving,⁴⁷ and the total cost would require a tax rate increase of less than 1% were the plan to be compulsory.⁴⁸

The money is, of course, significant, and likely enough to erase any claim that an apology is cheap talk, but it is neither devastating nor economically disruptive. The question for voters and donors is not so much whether it is affordable as whether it is a good idea that will produce healing and a forward-looking citizenry.

I have chosen these two groups of beneficiaries to illustrate several features of reparations, and not because I think it impossible to succeed either with transfers to organizations rather than to individuals or with different beneficiary groups. The important quality is that the beneficiaries not be so numerous as to doom the plan as too expensive, nor so limited as to make it inconceivable that the plan will attract political support, promote better race relations, and decrease rather than raise calls for further reparative payments in the future. This last feature reflects the notion that a successful plan will offer finality, or at least will have the potential to do so.

The novelty of the plan examined here has less to do with these beneficiary groups (and indeed, I have suggested that payments could be channeled through organizations rather than directly to individuals) than it does with the source of these considerable funds. The plan is to ask for donors. It is to suggest to donors that, as with so many other things undertaken in this country,

HISTORICAL TABLES 76 (2003) (listing government expenditures by department and agency), available at <http://www.whitehouse.gov/omb/budget/fy2005/pdf/hist.pdf>.

⁴⁶ BRIAN M. RIEDL, THE HERITAGE FOUNDATION, \$20,000 PER HOUSEHOLD: THE HIGHEST LEVEL OF FEDERAL SPENDING SINCE WORLD WAR II (2003) (detailing the growth in national spending), at <http://www.heritage.org/Research/Budget/BG1710.cfm>.

⁴⁷ Individual charitable contributions totaled \$179 billion in 2003. See Rachel Emma Silverman, *Charitable Giving Increased Last Year, Rising Nearly 3%*, WALL ST. J., June 21, 2004, at B6.

⁴⁸ Federal individual income taxes (excluding Social Insurance and Retirement Receipts) totaled \$794 billion in 2003. See OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES 2005: HISTORICAL TABLES § 2, at 30 (showing yearly tax receipts by source), <http://www.whitehouse.gov/omb/budget/fy2005/pdf/hist.pdf>. An increase of \$6.9 billion (\$6.6 billion for graduates and \$.3 billion for veterans over ten years) is approximately a 0.3% tax hike for individuals if funded through increased individual taxes.

individual and corporate volunteers can, in the aggregate, accomplish important objectives that might fail or be done less effectively if entirely public in nature. The public fisc would encourage contributions by offering a 50% tax credit, and it would also promise a full tax credit for past payments in the event that reparations were one day legislated or adjudicated in a way that makes payments mandatory. An advantage of the matching scheme is that the life of the payments to high school graduates would be determined by the enthusiasm and decision-making of individual donors, much as many other activities and entities are governed effectively by their ability to raise private contributions. The government allows tax revenues to follow private decisions in its support of hospitals, universities, religious organizations, and much else.⁴⁹ In a similar fashion, reparations could effectively be privatized. I envisage a set of eminent trustees who would not only manage the fund in order to make orderly payments, but who would also be empowered to dissolve the Fund when they saw fit and be in a position to return payments and forgive pledges if the Fund attracts insufficient resources to make possible even the projected reparations to the first beneficiary group.

III. INDIVIDUAL DECISIONMAKERS AND RECIPIENTS

Reparations schemes – by which must be meant something more than settlements paid in the shadow of litigation that has a good chance of success for plaintiffs – are, to be sure, fairly unusual.⁵⁰ They have either followed wars or (generally perceived) wrongs quite closely in time, or they have taken the form of payments to identifiable victims at a point when no plausible claim for additional recovery would likely arise in the future.⁵¹ The first category

⁴⁹ See Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 404-08 (1998) (indicating that the government supports various organizations through charitable deductions by “matching” individual contribution through tax “reimbursement”).

⁵⁰ See Posner & Vermeule, *supra* note 1, at 696-98 (charting past reparations payments). The U.S. government has paid claims both to groups and individuals in reparations for past actions. See *id.* For example, in 1946, the U.S. paid approximately \$800 million to Native American tribes for land that had been taken without proper purchase; in 1998, the U.S. paid approximately \$1.65 billion (\$20,000 each) directly to Japanese Americans interned during World War II; and, in 1997, the U.S. apologized for and paid approximately \$9 million to African Americans who were denied treatment for syphilis as part of a government-sponsored experiment begun in the 1930’s. See *id.* Other experiences are catalogued in Chisolm, *supra* note 5, at 713-17.

⁵¹ This is not a description or categorization that I used in previous work on reparations, see generally Levmore, *Changes*, *supra* note 3, at 1686-1700, but it now seems to me to be accurate and so I introduce it here. It suggests that the most notable feature about the timing of reparations to Japanese American internees, for example, was not that the victims were old and therefore available to politicians for only a short period of time, but rather that their age meant that it would be unlikely that, following substantial payments, a new claim would one day be advanced for further reparative payments. Payments are more likely when those who must pay are convinced that the payments will offer some finality. See *id.* at 1693

includes post-war payments by Germany to organizations, Holocaust survivors, and Israel.⁵² The second category is best illustrated by reparations to some 80,000 aging survivors of Japanese American internment camps.⁵³ In contrast, African American slavery is now sufficiently behind us, which leaves millions of indirect victims, but none of the original wounded, so to speak. Moreover, there are so many indirect victims that it would be difficult to identify a uniquely deserving, manifest class of beneficiaries, which indicates that reparations on this basis will likely never succeed.⁵⁴

Reparations claims on behalf of those who suffered from overt racial discrimination in employment or education may seem less far-fetched to the majority,⁵⁵ but these claims also suffer from imprecision with respect to beneficiaries. This imprecision has bearing on the very likelihood of a reparations plan because an obvious objection to any given plan is that it fails to pay deserving persons or that it pays undeserving persons.⁵⁶ Under-

(commenting on the importance of finality in reparations schemes).

⁵² See Kurt Scherwin, *German Compensation for Victims of Nazi Persecution*, 67 NW. U. L. REV. 479, 514-18 (1972) (describing payments totaling more than 100 billion Deutschmarks); see also DEP'T OF STATE, GERMAN COMPENSATION FOR NATIONAL SOCIALIST CRIMES (describing the scope of reparations claims begun in 1953, and payments of more than 72 billion Deutschmarks), at <http://www.ushmm.org/assets/frg.htm> (last accessed Sept. 6, 2004).

⁵³ See Posner & Vermeule, *supra* note 1, at 696 (listing the facts of the Japanese American reparation plan); Chisolm, *supra* note 5, at 713-15 (discussing the reparation payments to Japanese Americans subjected to forced internment during World War II)

⁵⁴ See Ogletree, *supra* note 5, at 313 (conceding the difficulty in determining individual harm and in finding a coherent unit of beneficiaries for slave reparation payments). Reparations tied to slavery would gain political support because of the greater likelihood of finality. See Levmore, *Changes*, *supra* note 3, at 1693 (asserting the political necessity of finality in any reparations claim). In contrast, reparations linked to past discrimination would open the door for claims of similar treatment for victims of other forms or periods of discrimination. See Posner & Vermeule, *supra* note 1, at 746 (acknowledging the criticism that granting one group reparations may cause other groups to make similar claims). The problem, of course, is that the best we can do now is find distant relatives of slaves. See Yamamoto, *supra* note 19, at 491. A separate problem is that those asked to pay for reparations will feel further removed from slavery than they do from much of the history of discrimination. See *id.* (describing one argument against reparations as the fact that "white Americans living today have not injured African Americans and should not be required to pay for the sins of their slave master forbearers" (internal citations omitted)).

⁵⁵ I introduce the idea of the majority here by way of recognizing that reparations plans require political approval. The discussion below is focused on this need to bring about a political coalition, rather than to construct a plan that is simply morally attractive, or satisfying to those who have been wronged.

⁵⁶ The objection is both moral and political, though it is the latter that interests me most here. Imprecision makes reparations less attractive in part because it reflects a failure to get the moral question right and in part because it makes it more likely that the reparations plan will not provide finality, a feature that (I have already suggested) is important for political

inclusive and over-inclusive rules (and thus outcomes) are the stuff of law, but every deviation from an ideal adds weight to criticism of the rules or methods by which the ideal is pursued. Substantial deviations would appear to doom something as controversial as African American reparations.

The most obvious antidote to imprecision is to have reparations payments go to organizations rather than to individuals.⁵⁷ If reparations were paid to existing and historically black institutions, including museums dedicated to the African American experience, the imprecision criticism would be muted and there might be some tangible educational and political benefits. A good thought experiment is to imagine that somehow Congress approves a large reparations fund and the primary question is whether to pay this out to individuals or to organizations. Reasonable people will disagree as to which distribution plan is superior. If the problem is put earlier in time, as it is here, so that one must also ask which distribution plan is more likely to elicit such funds from Congress in the first place, then the answer is almost surely the organizational, rather than the individual, route, if only because organizations will better overcome collective action problems in order to exert influence on the legislature and secure passage of the plan.

In fact, most large-scale reparations plans, including German payments following World War II and U.S. payments to American Indians in 1946,⁵⁸ provided for payments to intermediaries, namely the State of Israel and Indian tribes.⁵⁹ Intermediating groups, and especially the likelihood that such groups will take part in a legislated program, do, of course, generate rent-seeking costs,⁶⁰ and there is a political cost associated with the likelihood that some organizations will inevitably spend resources in ways that displease voters.

In the case of reparations for American Indians, an ingenious or coincidental advantage of channeling all payments to tribes (and clans) was that the tribes “solved” the problem of separating deserving beneficiaries from pretenders.⁶¹

success. See Levmore, *Changes*, *supra* note 3, at 1693; Posner & Vermeule, *supra* note 1, at 744-45.

⁵⁷ See Posner & Vermeule, *supra* note 1, at 739-40 (discussing the possibility and benefits, mostly in reducing the imprecision of beneficiaries, of reparations payments to African American organizations); see also ROBINSON, *supra* note 9, at 244-46 (arguing for reparations payments to a trust fund established to benefit all African Americans).

⁵⁸ See Posner & Vermeule, *supra* note 1, at 696-98. I will consider these reparations, though they might be thought of as settlements in the shadow of possible litigation.

⁵⁹ See *id.* at 696-98.

⁶⁰ See Levmore, *Changes*, *supra* note 3, at 1698 (positing that “the possibility of reparative payments will bring forth rent-seeking by groups interested in obtaining payments, and that these lobbying, litigating, and fundraising efforts can be thought of as wasteful”).

⁶¹ See *id.* at 1694 (comparing stated reasons for limiting payments to tribes with political choice explanations). The novel argument hinted at in the text here is that in all cases of ethnic or racial reparations, there will be the difficult problem of persons claiming membership in a group where a claim may be wrong, opportunistic, or impossible to

No government would wish to be in the politically incorrect, and perhaps impossible, position of ruling on racial or ethnic eligibility, and in this case the government effectively passed that problem on to the tribes.⁶² In other contexts, there are notorious problems associated with benefits that accrue to tribes,⁶³ so that the problem of identifying genuine tribes can in theory be just as bad as that of identifying individuals, with tribes then also in the business of identifying their true members.⁶⁴

Where African American reparations are concerned, it is probably the case that the very significant problem of identifying beneficiaries, or even stating what qualities or history make for qualification,⁶⁵ could be avoided by channeling all reparations to organizations that are historically identified with African Americans. This is probably the best argument for using organizations, and, consequently, for modifying the plan offered in the present article. Organizations do, however, bring on significant rent-seeking and agency problems. Moreover, the problem of identifying African American beneficiaries is no worse for a reparations plan than it is for an affirmative action program, and inasmuch as some voters and contributors will favor a reparations plan because they think it will reduce pressure on affirmative action, I hesitate to tilt the balance in favor of (or against) reparations simply by deploying organizations.

Nevertheless, I will continue to advance the idea of reparations to individuals and *not* to organizations, though organizations will play a small role in receiving contributions after the reparations plan itself comes to an end.⁶⁶ I do this, in part, to emphasize the “privatized” and novel aspect of the

evaluate accurately (perhaps even by the claimant). The government might like a scheme that takes the decision-making out of its hands and puts it in the hands of another entity, for such removal will deflect criticism. If the beneficiaries are pre-existing organizations, such as tribes, the problem is virtually eliminated, and the question becomes one of how the tribes will spend the money they receive. Again, criticism will be deflected.

⁶² See JEFF BENEDICT, *WITHOUT RESERVATION: THE MAKING OF AMERICA'S MOST POWERFUL INDIAN TRIBE AND FOXWOODS, THE WORLD'S LARGEST CASINO* 143-44 (detailing the events in which the government abandoned their efforts to obtain proper documentation of the legitimacy of the Pequot tribe before paying reparations to a trust fund to finance the tribe's property acquisitions).

⁶³ See *id.* at 144-50 (illustrating the difficulties involved in determining the legitimacy of alleged tribe members and in evaluating their eligibility for reparative payments).

⁶⁴ See *id.*

⁶⁵ See, e.g., Posner & Vermeule, *supra* note 1, at 740 (discussing the difficulty in assessing those harmed by slavery and historical discriminatory practices); Yamamoto, *supra* note 19, at 491 (acknowledging that opponents to African American reparations often argue the imprecision of identifying legitimate beneficiaries).

⁶⁶ See *supra* note 37 and accompanying text (explaining that the trustees will distribute funds to organizations after the dissolution of the Fund). It will be useful to specify the designated entities in order to create something of an organized interest group that might work to bring about the larger reparations plan.

plan sketched here. One reason to pay organizations is that they will then be more inclined to throw political weight behind the plan, but because payments are to come out of individual rather than Congressional decision-making, there is less need to build political support.⁶⁷

Organizations, and especially corporations, could play a much more significant role where the burdens, rather than the benefits, are concerned. As a sentimental matter, the most impressive reparations plan would probably be one where many tens of millions of individuals signed an apology and pledged to make payments to their African American compatriots. But in the real world, where the overwhelming majority of White Americans feel no responsibility for discrimination during World War II or for the discouraging prospects of many African Americans of high school and college age, much less for slavery, the path to success probably travels through the corporate sector. Large corporations⁶⁸ might see voluntary reparations as good public relations, and the wholesale participation of businesses might well impress a significant segment of the population, especially African Americans who are now understood as favoring reparations.⁶⁹ There will be room for cynicism, of course, but the opt-in character of the plan is likely to do more for the apologetic spirit of reparations than any legislation passed by a close vote (or, more likely, not passed at all). The cynicism could be largely erased by anonymity, as apologies will seem more meaningful if they are not part of an

⁶⁷ On the other hand, organizations might be useful in enacting the pieces of legislation necessary for the plan sketched here, and they might also serve to advertise or educate individuals asked to contribute to the Reparations Fund described presently. In some part, I choose the individual route because it is more interesting, and not because it is more likely to succeed – though success remains the stated point of the exercise. There is also the unstated point that organizations have weight because they have or can overcome collective action problems and yet we should not assume that every organization has unexploited power to spare.

⁶⁸ I do not mean to exclude partnerships and other entities, though the tax deduction will often be worth more to corporations – and partners might prefer to contribute as individuals. Similarly, foundations and other not-for-profit entities might help fund a reparations plan, but donors to foundations will likely prefer the partial tax credit available for direct contributions over the deduction normally associated with transfers to foundations. Foundations with substantial endowments might, however, be an important source of matching funds and other incentives that would be useful in encouraging individual contributions to the Reparations Fund.

⁶⁹ See *supra* note 10 (reporting survey data that indicates reasonably strong support for reparations among African Americans). The idea here is that a majority might be disinclined to support reparations, but a minority might be extremely well disposed. Firms that support reparations might gain so much from this minority that it would be worth any minor discomfort experienced by a larger number of customers or shareholders. In the longer run, if the reparations plan succeeded in bettering race relations, ending race-based programs that the majority liked even less, or bringing finality to the reparations issue, participation by a firm would likely be seen as a very positive thing, even by persons who were initially inclined to attach a negative image to firms that favored or engaged in reparative payments.

advertising campaign that serves the corporation's interests. On the other hand, those who most wish to hear an apology normally need to know who is doing the apologizing, so that anonymity and apology do not normally go well together. In the end, if more than half the Fortune 500 contribute significantly to a reparations plan of the kind sketched in this article, the plan would likely be regarded as enormously successful. Success can thus come by way of a privatized reparations plan, through which individuals could also join in with contributions of their own.

IV. PRIVATIZATION AS A MEANS OF ATTRACTING MAJORITY SUPPORT

The central idea here is that a reparations scheme can be elective, of an opt-in or opt-out form,⁷⁰ with some individuals and firms choosing to make payments while others do not. The plan advanced here comes in two steps: (1) enabling legislation that might well be supported by many citizens who do not plan on making direct payments; followed by (2) a long period in which volunteers choose individually the degree to which they will bear the burden of reparations. If there are sufficient volunteers, the plan is likely to be successful and last for a period of years determined, for the most part, by the presence or absence of new, later volunteers.

Voluntarism is not nearly as startling on the beneficiary side. One reaction to the suggestion that some African Americans might find reparations distasteful⁷¹ is the obvious response that such citizens, assuming they are in the designated beneficiary class, can always decline to accept reparative payments. Note, in passing, that this may be an advantage that attaches to a scheme that avoids organizations and provides payments to individuals. But the power to decline does not answer all objections. One who objects to reparations on grounds of distasteful commodification might be satisfied by simple refusal. On the other hand, an objection based on the possible taint recipients might endure, or based on the risk that reparations (even if accompanied by some sort of political or collective apology) might bring a period of remorse or education to a close, will not be overcome by an individual's declining to receive a reparative payment. It should be sufficient to note that other reparations plans did come into existence even though there were surely some sensible and principled persons who declined, or were even offended by, the offer of reparations.

There is, however, good reason to think about the majority that is necessary

⁷⁰ I have focused on an opt-in illustration, but voluntariness could be of the reverse form with an assessment on each individual and business based on income, wealth, or some other feature, followed by an opportunity to opt-out of the plan. See Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2100-07 (2004) (discussing the differences between opt-in and opt-out schemes).

⁷¹ See Posner & Vermeule, *supra* note 1, at 723-25 (commenting on possible objections from the beneficiary class, based on a notion that reparations could be demeaning or offensive).

to enable payments, though not to make payments, for personal election rather than majority vote is there required. Enabling legislation includes the institution of a partial tax credit⁷² (or at least the willingness to accept a tax deduction for reparative payments⁷³), without which success seems impossible. The promise to give credit in the event that mandatory reparations come into being is less critical, but also significant. In a world in which only a very low percentage of White Americans favors reparations,⁷⁴ how can one contemplate sufficient support for the enabling legislation?

The question takes us to the heart of the way we publicly finance many endeavors through tax deductions and credits. It is, as I have described elsewhere, that taxes are ballots.⁷⁵ Most taxpayers would not vote for direct government support for my law school (and indeed we get none), but they may

⁷² The main argument for the partial tax credit approach is that many taxpayers do not receive any benefit from deductibility. This has been a recurring argument in favor of converting some deductions into credits, or partial credits. See, e.g., Daniel Halperin, *A Charitable Contribution of Appreciated Property and the Realization of Built-In Gains*, 56 TAX L. REV. 1, 35-38 (2002) (discussing the choice of deductions or credits). The argument for the credit approach seems especially strong here because it makes recapturing much simpler (in the event of future mandatory payments or if insufficient funds are raised at the outset). Recapturing deductions is a much more difficult calculation for unsophisticated taxpayers. Another argument for the credit approach is that while partial credits of this sort are not unknown, see, for example, I.R.S. PUBLICATION 503: CHILD AND DEPENDENT CARE EXPENSES (2003) (showing that the child-care credit can range from 20-35% of qualifying child and dependent care expenses, depending on income), <http://www.irs.gov/pub/irs-pdf/p503.pdf>, they are sufficiently unusual as to draw attention to the underlying scheme, and education is surely part of the argument for a reparations plan. A full credit would, however, weaken the taxes-as-ballots approach, because “voters” for reparations would externalize the entire cost on other taxpayers. Finally, and most important, a failure to provide any government subsidy or to match individual contributions is likely to doom the plan.

⁷³ The argument for deductibility (or an even stronger incentive) is fairly strong. Indeed, a case can be made that no special legislation is required because the Reparations Fund might easily qualify as a 501(c)(3) entity, entitled to tax-exempt status and enabling qualifying donors to receive charitable deductions for their contributions. See I.R.C. § 501(c)(3) (2004). On the other hand, however much the plan is apologetic and redistributive, it is not limited to needy beneficiaries and they are not required to use the reparative payments for educational needs. See *id.* § 170(c). Congress (or the Internal Revenue Service) would probably be asked to enact explicit legislation in order to remove any uncertainty about the status of the payments that are received, not to mention the deductibility of those made. The credit approach would plainly require specific legislation.

⁷⁴ See *supra* note 10 and accompanying text.

⁷⁵ See generally Levmore, *Taxes as Ballots*, *supra* note 49, at 387-89 (arguing that “the tax system . . . can be used to gauge preferences in a way that substitutes for, or even improves upon, a function normally performed by the ballot box or by privately organized surveys” and, consequently, “the tax system can be understood as allowing dispersed donors to determine which agents, projects, or causes the government will finance”).

be willing and perhaps even eager to allow the government to match any contribution I make to it. My willingness to give \$1,000 – in the form of a nominal \$1,500 donation with the associated tax preference worth, say, \$500 to me, calls forth some taxpayer support because of the tax deduction for qualified charitable giving.⁷⁶ Through this system, the government can be seen as enlisting the help of its taxpayers in identifying good social investments.

Support of this kind can also be seen as the product of a political bargain among parties who fail to agree on a direct government subsidy, but are able to agree on indirect and partial support. One citizen, *A*, might be disinclined to favor reparations (or payments to a law school, for that matter), but not opposed to doing so if others bear the brunt of the cost. It may be that neither *A* nor *A*'s ancestors were directly involved in wronging the aggrieved class, or perhaps *A* is uncomfortable with the weak connection between those who were wronged and those would now benefit from reparations. If *A*'s family were part of the mass immigration pattern of the twentieth century, then this connection might be made stronger by structuring African American reparations as a response to employment or educational discrimination in the 1950s rather than to slavery in the 1850s. In either case, it is useful to limit the characters and stereotypes and assert that virtually any reparations scheme involving millions of people is likely to have a matching problem that causes our hypothetical group of citizens, represented by *A*, to stand in opposition.

Alternatively, *A*'s disinclination may be jurisprudential. *A* may be of the view that legal remedies ought to offer finality or perhaps even reflect a timeless moral theory, so that something held to be lawful after due deliberation in the past should not now be regarded as grounds for guilt and reparations. Such views, not to mention simple self-interest, might cause *A*, or politicians who seek *A*'s support, to vote against a reparations proposal. *A* could be expected to abide by any law passed by a lawful majority, but reparations schemes would come to pass only over *A*'s objection. If citizens like *A* enjoy a comfortable majority, or otherwise get their way in the legislature and courts, then we will normally expect no large-scale reparations.

But, it is possible that *A* is willing to allow or even to facilitate reparative payments to be made by other citizens, so long as *A* is unburdened. More interestingly, *A* may be agreeable so long as *A* pays a relatively small share, or need not be seen as favoring reparations or admitting responsibility for past wrongs. For expository purposes, let us imagine that *A* is simply lukewarm to the idea of reparations and comfortable with such a remedy, or process of social recovery, only if the cost is largely externalized. In particular, *A* will regard reparations to African Americans as something that is to be supported

⁷⁶ See I.R.C. § 170 (stating the general rule that “[t]here shall be allowed as a deduction any charitable contribution . . . payment of which is made within the taxable year”). There is also a form of matching inherent in the tax-free status of the Law School, so that it has no income tax upon receipt of tuition and contributions, but this added complexity of benefit, if it is indeed that, adds little to the story told here.

only if it is part of a political bargain that gives *A* some things that *A* really wants (as perhaps *A* did for the case of interned Japanese Americans, or for survivors of ugly massacres that gained prominence after deferred historical review⁷⁷). *A* thus regards reparations about the way most citizens view road-building proposals in distant states; they like them better the more the cost of construction falls on other taxpayers or on actual users, and they are more willing to pay for them the more these roads are part of a political package in which other taxpayers bear burdens associated with benefits that are enjoyed closer to home.

In this vein, we might imagine *B* to be a voter who opposes reparations and any government intermediation in favor of reparations. Perhaps *B* finds reparations to be immoral or bad precedent or likely to foster wasteful rent-seeking, as a variety of groups step forward to assert why they too ought to be part of a reparations scheme that the government enables.

There is also likely to be *C*, an individual, firm, or large group of voters, who very much favors reparative payments. *C* would vote in favor of almost any plan that raised revenue to transfer to African Americans or some subset of African Americans.

Two sorts of individuals, with opposing views, may ally with *C*. *D* favors reparations, but not if they are voluntary. *D* may think it just or educational to impose reparative payments, or *D* may find free-riding revolting. *D* wants the government to pay reparations. In contrast, *E* favors reparations only if she can pay them voluntarily. *E* may not want reparations to be terribly divisive, and she thinks that a mandatory scheme will create more problems than it solves. Many other sorts of individuals and groups are possible, and some over- and under-inclusiveness is inevitable, but these representatives are sufficient for present purposes.

The next step is to imagine that none of these individuals or groups has a majority, but that a coalition, and perhaps even a stable majority coalition, can be formed in a manner that overcomes *B*. This sort of coalition has not arisen in actual experience, the argument goes, because of transaction costs and something of a failure of imagination. But with some groundwork we can envisage a reparations plan that appeals to *A*, and thus manages to gain approval from a majority of voters, including *A*, *C*, and *D* or *E*.

The strategy conceived of here thus bears some resemblance to many not-for-profit organizations. The resemblance derives from the fact that a system of optional payments is precisely what most charities offer. Much as a university might announce a scholarship plan and ask donors to contribute to it, and then ask students to attend the university and accept the scholarship money, so too a reparations plan for African Americans, or a subset that can trace its connection to a particular past wrong, can ask donors to make

⁷⁷ See, e.g., Yamamoto, *supra* note 19, at 490 (referring to reparations paid six decades after the 1923 Rosewood massacre to some 154 survivors and descendants and noting the importance of features such as identifiability and likely finality).

reparative payments and cannot, of course, force all intended beneficiaries to accept payments. Put this way, privatized reparations will seem less like a government program because most such programs use the power of the state and of majority rule to force dissenting citizens to contribute to funding programs, and more like conventional charities, which rely on voluntary contributions, and then secondarily on government grants, tax deductions, and tax-exemptions.

A reparations advocate will want to de-emphasize the apparent similarity between privatized reparations and conventional philanthropy, if only because intended beneficiaries may react with great hostility to a reparative plan that smacks of charity. A plan that was palatable to *A* and also to a majority of voters will not accomplish much if it irks intended recipients. These recipients may be interested in something closer to a true apology, though that may never be possible in intermediated form. In any event, charitable reparations, if I can call them that, may give more offense than reconciliation.

It is arguable that the beneficiary class ought not or need not react negatively to a plan that resembled charity. After all, even a straightforward apology by a government, whether standing alone or accompanied by reparations, is at best the product of a majority vote. An apology that is the product of a 60-40 vote, or perhaps one that follows some bargaining over other matters in order to produce a majority coalition, will inevitably provide something of a strange taste. A true democracy may be incapable of the art of deep and comforting apologies.

Two of the smaller novelties introduced here draw further attention to the very thin line between charitable endeavors and direct, government programs. I refer to the idea of returning contributions if a minimum amount is not raised and to the notion of giving credit for past payments in the event that payments become required by law.⁷⁸ The latter presents logistical difficulties, but the

⁷⁸ The promise of a critical mass of contributors, or your money back, is central to the privatization idea. If the trustees are good fundraisers, then they might secure pledges in advance of a public phase of this reparations program in order to show that a critical mass of contributors is already on board. Thus, if a website is deployed, or the Internal Revenue Service can add a line to individual tax returns providing a check-off system for the solicitation of pledges, it will be useful to provide filers or website visitors with information about promises that have already been made. Ideally, those who choose to bear the burden of reparations could make contingent pledges of the form "I pledge to increase my tax bill by 10% in each of the next five years so long as one million or more other taxpayers do the same." As pledges are made and publicized, more are to be expected. One can also imagine the trustees or organizers' soliciting matching pledges in advance; *C* will be more likely to contribute if *C* knows that her pledge brings on a matching government pledge of sorts, because of the partial tax credit, and an additional matching amount in some ratio from a foundation or set of philanthropists. *C*'s \$1,000 might in this way be "worth" \$4,000 to the Fund, and if *C* cares about the success of the reparations plan, then *C* will be more inclined to contribute under these terms. An advantage of matching grants, rather than outright large gifts, is that part of the success of privatized reparations comes from large-scale

ideas have been included here in order to focus attention on a variety of collective action problems. The first idea is simple and is probably unfamiliar only because one cannot normally receive a tax deduction for a highly contingent contribution. It is common, however, to give money in restricted fashion, so that a donor may receive a tax deduction for money given for the specific purpose of building a new hospital wing.⁷⁹ But if the hospital is ever in the position where it is forced to return the money to the donor, the donor must report income under the tax-benefit rule so as to refund to the government that which the taxpayer gained by the earlier deduction.⁸⁰ The same would be done here, whether deductions or partial credits are at issue.⁸¹ In large part, the promise to return money intended for reparations can be recharacterized as restricting contributions to the Fund's two target groups, and forcing the return of all money if the Fund is unable even to make the \$20,000 payments to each surviving African American veteran in the first group. The point is simply to encourage volunteers, who may reason that the benefits of the reparations plan depend on large-scale participation and payments.⁸²

The second promise, to give credit for voluntary payments should taxes or other mandatory payments be required in the future, also aims to encourage volunteers, who may otherwise fear that they will contribute now only to be forced to pay once again in the future.⁸³ But this promise crosses the line from

participation, because without such opting-in the plan will seem less like a societal apology and rectification, and more like a charitable endeavor that the overwhelming majority of the population opposes or finds trivial.

⁷⁹ See Levmore, *Taxes as Ballots*, *supra* note 49, at 420-21 (noting that donors often restrict donations to be used for specific purposes).

⁸⁰ See I.R.C. § 111 (2003).

⁸¹ The tax-benefit idea is complicated. Imagine a taxpayer who expects to earn \$200,000 a year, and expects tax rates of 40%. The taxpayer pledges to the Reparations Fund a 10% surtax for five years, and a 50% credit makes this the equivalent of a 45% tax rate rather than a 50% rate. After several years of such payments and credits, a mandatory reparations scheme is legislated, and it is estimated to require a 1% hike in the income tax. Note that this is a conservative estimate, as federal individual income taxes (excluding Social Insurance and Retirement Receipts) totaled \$794 billion in 2003. See OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES 2005: HISTORICAL TABLES § 2, at 30 (2003), available at <http://www.whitehouse.gov/omb/budget/fy2005/pdf/hist.pdf>. In any event, our taxpayer has been promised credit, but is this a credit for the \$20,000 per year nominally paid, for the \$10,000 per year post-credit cost, for one of those amounts plus the time value of money, or for some amount that depends on the projected payments this taxpayer would be required to make under the new scheme and at the taxpayer's current income level? The simplest and also most reasonable answer is probably a \$10,000 non-refundable credit that can be carried forward.

⁸² See Ogletree, *supra* note 5, at 284 (expressing the need for all Americans to participate in reparative programs to effectively "eradicate racism" and "to work toward correcting the chronic fragmentation along racial lines that exists in so much of our country today").

⁸³ Skeptics will have already noticed that the promise to give credit for voluntary payments, in the event that mandatory payments are later legislated, is worth only as much

as a later government chooses. A promise not to raise taxes, whether made by a Congress or by a candidate for President, is easily broken later on, and, indeed, changed circumstances may make it foolish to keep earlier promises. Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 624-27 (1996) (commenting on the difficulty of designing enforceable precommitments). The same can be said about promises to end or continue affirmative action. It is impossible to bind a distant Congress or Court. A government would need to work very hard indeed to influence future governments – or to provoke later courts to declare that something was unconstitutionally retroactive, which is to say impermissible or legal only if accompanied by just compensation (which would defeat the point of the tax or other charge). Still, promises are worth something because there is a political cost to breaking them. *See id.*

Another problem is that a mandatory reparations plan may come about without a clear plan as to who bears the financial burden. If, for example, the government simply borrows to pay reparations, it will be hard to say who is paying the freight. Earlier contributors could receive the credit as soon as a reparations plan is announced, on grounds that the money must come from somewhere. It might therefore be presumed to come from general tax revenues, but this is likely to over-stimulate these voluntary contributors into pushing for a government-sponsored (non-privatized) reparations plan. By way of further illustration, imagine a reparations plan that was to be paid for by an excise tax or a special corporate tax on businesses or products thought to have benefited most from past discriminatory policies. With such a plan legislated, it would seem inappropriate to give the credit for earlier payments. A promise to reimburse earlier payments (in credit or other form) regardless of the form of the public reparations program thus seems unwise; earlier volunteers might affirmatively *pay* (or lobby extensively) for such a reparations program in order to get a program through at someone else's expense *and* receive their money back.

There is, of course, another means to guard against the problem of putative volunteers holding back because they fear that payments will be required of them in the future. It is to promise that there will be no future reparations plan. For better or worse, such a promise may simply not be credible. *See id.* Reparations could be required by a court after a lawsuit is brought against the government or against a large class of individuals or businesses, and the anxious taxpayer will fear that he or she faces double payments. It seems likely that if there were a method of guaranteeing that a proposed reparations or affirmative action would expire on a given date and never be followed by another such plan, then many more citizens would favor these plans – and perhaps more generous versions of them. The real question, therefore, is whether the promise to give credit to earlier volunteers (in the event that a mandatory plan is later enacted) is more credible than the promise not to entertain any future reparations plan. My affirmative answer to this question is based on the observation that while it is easy to imagine substantial political pressure in favor of reparations – be they additional or directed to a group that did not receive reparative payments under the plan described here – it is very difficult to imagine that passions or politics will call for breaking an earlier promise to give credit for payments voluntarily made. Common sense, political reputations, and moral intuitions will support keeping that promise, and there will be no strong interest group or social pressure to break it. In contrast, a promise to pay no further reparations might easily run up against the will to do more or to pay persons who have not yet recovered, much as the question of German reparations have been re-opened half a century after earlier reparations were paid, and much as claims about Indian lands were advanced long after the Indian Claims Act of 1946. *See Levmore, Changes, supra* note 3, at 1693-96 (admitting that many past reparations programs have failed to achieve finality).

taxpayer-government partnership to the creation of an interest group with something of an investment to protect. The critical point is that the promise to protect contributors against double payment, so to speak, will transform many of these contributors into unusually strong proponents of future, *mandatory* reparations. What looks like a safety clause, to induce contributions from those who hesitate because they do not want to run the risk of paying twice, creates a group of voters who can be expected to seek to force reparations payments on less enthusiastic donors through a mandatory plan in the future. This mandatory plan will be costless to the first group because of the provision which treats their earlier "voluntary" payments as down payments against any future taxes or other required payments. To be sure, some volunteers will surely vote against a later, mandatory plan, perhaps because they value free choice, because they think sufficient reparations will be paid without a tax-based system, because they might, in self-interested fashion, fear that mandatory reparations will open the door for other tax-supported plans that they do not support, or even because they receive pleasure from having participated in a successful voluntary plan. But many, if not most, of the volunteers can be expected to favor reparations and, thus, the extension of reparative payments to many years of high school graduates, especially, if this can be done at no cost to them. They will, in essence be in a position to vote for the complete externalization of costs. This group, joined by those who hope to receive reparations, will need to find coalition partners, but the point is simply that a voluntary plan can make a compulsory plan more likely.

The same is not true for most taxpayer-government partnerships, accomplished through deductions and credits.⁸⁴ Donors to the American Red Cross secure government financing, or partnership, through the tax deductions they receive. They are also more likely than most citizens to vote for direct government payments to that organization or to the very program the Red Cross undertakes. They have, after all, revealed themselves to be persons who have great faith in the Red Cross, and so they are more likely than most to think that government support for the Red Cross is wise. They would be even more likely to favor direct support if somehow the government's direct payments to the Red Cross came from taxes on other citizens, but this is likely to be a marginal consideration. Indeed, a well run fundraising campaign by the American Red Cross is likely to convert direct government support into more private commitments of support, much as universities that receive the most direct government support are also, by and large, those that receive the most private support.

The cases that come closer to our promise of future credit for past payment are those where private investment makes further expenditures worthwhile. Consider, for example, private developers who build roads and develop new residential communities, or early railroad companies that built lines to new

⁸⁴ See Levmore, *Taxes as Ballots*, *supra* note 49, at 404-08 (discussing the functions of deductions and credits in taxpayer-government partnerships).

frontiers. With these investments in place, further expenditures are likely to be profit maximizing, which is to say not a product of a sunk cost fallacy. For example, the railroad may have found it worthwhile to invest in public safety in a frontier town because stability and trade generated profits for the railroad. But, of course, it may have been more profitable still to exert political pressure on the government to send troops to the town, because costs could be shifted to taxpayers at large. The overall picture is one in which private enterprise and voluntary systems can easily lead to public intervention and costs later on. Government policies reflect just such calculations when citizens are forbidden to travel to certain countries. Voluntary private activity can lead inexorably to costly government intervention later on, and the best way to avoid these costs may be to ban the private activity in the first time period. But we rarely consider this public choice problem, if it is that, in the case of domestic private enterprise and charitable endeavors.

My claim here is not that we should oppose privatized reparations because they will lead to standard (and more costly) reparations in the future, but rather that we can take this example of privatization as a window through which to see this new area of inquiry. In future work I plan to explore further this question of private enterprise and the creation of interest groups, or the path dependence of government activity. For now, I am pleased if readers share this sense that one period's private enterprise, so easy to celebrate, may be next period's public responsibility. The accompanying and difficult question is whether it is possible to know when it is sensible to place burdens in front of the first period's entrepreneurs, or even possible to secure promises of private, rather than public, financing for the investments that will be called for in the later period.

V. SUMMARY

A reader who has come this far has seen enough to understand the present exercise. It is to design a reparations scheme, focused on the African American experience, with some chance of enactment and success. Political experience, history, financial realities, and even survey data suggest that straightforward reparations to all African Americans are quite unlikely. This may be especially true because of the uncertain future of affirmative action. I have avoided describing reparations as a substitute for affirmative action, though it ought to be noted how different they would be. Voluntary payments fund the reparations described here, while affirmative action's burdens fall squarely on *involuntary* losers, be they applicants or co-workers. Insofar as a more conventional reparations scheme is concerned, the absence of clear answers to the questions of who would pay, how much they would pay, and who would receive transfers, has made it difficult to get most people to take seriously the design of a reparations program. Concrete proposals to pay all African Americans who can trace their way up a family tree to a slave or, in much more recent times, to someone who suffered unrecompensed discrimination in education or employment, creates an enormous set of

beneficiaries and then seems to raise the objection that many, if not most, taxpayers bear little direct responsibility for those particular wrongs. Moreover, groups that bear more responsibility would escape making payments and other groups deserving reparations would not receive them. The strategy undertaken here has been to pick two very different beneficiary groups, one of the “right” age and one more forward looking, and to use voluntary contributors, assisted by government promises and tax credits in the manner of many tax favored programs that would never garner majority support.

The plan is private in some ways and public in others. The reparations are privatized in the sense that taxpayers choose whether to make direct contributions. But, the plan still requires government involvement if there is to be a partial tax credit (or other inducement), if pledges can be collected through the income tax system, if the income to the beneficiaries is to be tax free though it not be in the form of scholarships,⁸⁵ and if there is to be a credible promise of credit for voluntary payments in the event that the future brings a system of publicly-financed reparations. This is a formidable list, and so much so that the title of this article is a bit misleading. But the opt-in, or self-assessed,⁸⁶ character of the reparations payments is sufficiently novel and certainly unlike anything found in previous reparations plans as to deserve special attention.

The private part of this reparations plan brings to mind features of our campaign finance system, because its ability to fund campaigns and conventions also depends on individual decision making.⁸⁷ The private pledges will entirely determine the life of the reparative payments to the second group of beneficiaries. Somewhat similarly, private donors and taxpayers (who can check the boxes) largely determine the amount of money available to those who campaign for certain public offices.⁸⁸ In the reparations plan, however, the amount of the private contribution is entirely in the hands of

⁸⁵ If the money received is not in scholarship form and is not to compensate for personal injuries, then it is arguably subject to the income tax – unless legislation provides otherwise. See I.R.C. § 61 (2003) (defining gross income broadly as “all income from whatever source derived”).

⁸⁶ The burdens need not be self-assessed, for the trustees could name an amount and citizens could then decide whether to pledge that amount or not. But there seems to be every reason to prefer self-assessments by individuals and corporations. It may be a good fund-raising technique to establish a minimum pledge, unless revenue-raising is subsidiary to the amalgamation of a large number of persons who can be said to agree to an apology and the principle of reparations.

⁸⁷ The amounts paid to finance presidential campaigns and conventions are set by statute, but individual check-off decisions determine the availability of those funds. See 26 U.S.C. § 9006 (2000). Admittedly, Congress can and has modified the amount of check-off contributions based on taxpayer response. Congress might also be expected to change the amount of payment if the revenues from this source changed considerably.

⁸⁸ See *id.* § 9006(c).

each contributor.

Although the above design exercise has tried to show that a quasi-voluntary reparations plan is conceivable, though perhaps just barely so, my larger aim has been to advance a variety of public choice questions. One is whether other opportunities exist to take private and diverse intensities of preferences into account, even though free-rider problems make it very difficult to assess these preferences. Much of what our governments do reflects the intense preferences of a minority of the citizenry, and this is especially so once we take government support in the form of tax preferences into account. Here, the question has been whether we can (or ought not to) expand this set yet further. If the reparations plan sketched here were to succeed, it would surely be an interesting springboard for other experiments in public choice, particularly where a significant minority has intense, but repeatedly unfulfilled preferences. Finally, I have sought to raise the question of how private enterprise often begets public activity through the creation of interest groups and path-dependent investment opportunities. This is a topic for future inquiry.